No. 08-462

In the Supreme Court of the United States

ALISON E. SHIMER, PETITIONER

v.

COMMODITY FUTURES TRADING COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Respondent Commodity Futures Trading Commission brought a civil enforcement action for fraud against petitioner's husband and others resulting in an award of restitution to customers. The district court disallowed petitioner's restitution claim and ordered the court-appointed receiver to distribute assets held for restitution to the remaining claimants without reserving funds for petitioner. Petitioner did not seek a timely stay. The question presented is as follows:

Whether petitioner's appeal from the district court's distribution orders became moot when (1) the assets in question were distributed to the other customers, (2) petitioner expressly disclaimed any request that the distributed funds be recalled, and (3) petitioner informed the court of appeals that she merely sought a legal ruling that the district court had erred in denying her claim because such a ruling would be helpful to her in potential future litigation against the receiver.

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 4a-6a) is not reported. The orders of the district court (Pet. App. 9a-18a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 20, 2008. A petition for rehearing was denied on July 8, 2008 (Pet. App. 7a-8a). The petition for a writ of certiorari was filed on October 3, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In August 2004, the Commodity Futures Trading Commission (CFTC) filed an amended complaint in federal district court against Robert W. Shimer, petitioner's husband. The complaint alleged that Mr. Shimer

and a number of entities and other individuals had participated in a scheme to commit fraud in a commodity investment scheme, in violation of 7 U.S.C. 6b(a)(2) and 6o. R. 64. Several defendants eventually entered into consent agreements with the CFTC, Pet. App. 19a-60a, while other defendants, including Mr. Shimer, proceeded to trial. With respect to the latter group of defendants, the district court entered judgment in favor of the CFTC on February 4, 2008. *CFTC* v. *Equity Fin. Group, LLC*, 537 F. Supp. 2d 677, 678 (D.N.J. 2008).

2. During the course of the district court proceedings, certain assets were placed under the control of a court-appointed receiver, Stephen T. Bobo (the Receiver), for ultimate distribution as restitution to victimized customers. R. 6. As part of the investor claim process, petitioner filed a claim with the Receiver for $150,000, based on an investment she had allegedly made in a commodity pool connected with the fraudulent scheme. R. 116, 572. Petitioner stated in her claim form that "I am married to Robert Shimer but this investment was intended to be mine in my name only." R. 572. Petitioner later explained that she had made the investment "in good faith" and asked not to be punished "solely because [her] husband [wa]s a defendant" in the underlying enforcement action. R. 116.

Both the Receiver and the CFTC objected to petitioner's claim. R. 153, 210, 572. They noted that the money invested by petitioner had originated from a joint checking account held in the names of Robert and Alison Shimer, an account that also received monies from other businesses controlled by Mr. Shimer as part of the fraudulent commodities scheme. R. 572. Because the amounts received from the scheme that were held in the Shimers' joint account exceeded the amount of the

claimed investment, the Receiver and the CFTC argued that petitioner's claim should be denied.[1] The Receiver and the CFTC also argued that it "would be inequitable" to allow petitioner to recover her claimed investment because she had involved herself with the affairs of some of the defendant entities and had "wrongfully profited" from her husband's fraudulent conduct at the expense of innocent investors. *Ibid.*

In light of those objections, the Receiver classified petitioner's claim as "disputed" and set aside approximately $103,950 for possible payment pending resolution of the disputed claim by the district court.[2] R. 555; Pet. App. 10a-11a. On November 13, 2007, the Receiver filed a motion with the district court requesting that it resolve petitioner's claim and disallow recovery so that he could close the receivership estate. R. 572. Petitioner filed a response opposing the Receiver's motion. R. 578.

On December 3, 2007, the district court issued an order disallowing petitioner's claim in its entirety. Pet. App. 12a. Two days later, the court noted that "the disputed claim of [petitioner] has been disallowed," and it ordered that the $103,950 previously set aside be released and combined with other receivership funds for final distribution to the other claimants. *Id.* at 17a-18a. Pursuant to the district court's orders, the Receiver dis-

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[1] Petitioner stated on her claim form that the source of the investment was "financing of property." R. 572. When objecting to petitioner's claim, the Receiver noted that the source of that financing was a mortgage on a piece of property that Mr. Shimer had recently inherited from his father. *Ibid.* Petitioner became a joint owner of the mortgaged property only after Mr. Shimer transferred part of his interest to her. *Ibid.*

[2] That amount represented a pro rata share, among all claimants, of the available receivership assets.

tributed the remaining funds in the receivership estate to eligible claimants on December 20, 2007. Pet. 10.[3]

3. On December 26, 2007, petitioner filed a notice of appeal from the district court's December 3 order disallowing her claim and the December 5 order releasing the funds previously set aside for her claim. Pet. App. 62a-63a. Petitioner also filed in the court of appeals a motion, dated December 24, 2007, to stay the two orders pending appeal.

a. On January 17, 2008, the court of appeals denied petitioner's motion for a stay. R. 592. The court held that the motion to stay was moot "because the receiver already has mailed the final distribution checks." *Ibid.* To the extent that petitioner sought an order "requiring the receiver to stop payment on those checks," the court refused to grant such relief. *Ibid.* The court of appeals also found that petitioner had neither sought a stay (timely or otherwise) in the district court nor shown "that doing so would have been impracticable." *Ibid.* (citing Fed. R. App. P. 8(a)(1)(A)). Finally, the court held that petitioner had failed to show that "the relevant factors weigh in favor of granting relief." *Ibid.*

b. On March 7, 2008, the Receiver filed a motion to dismiss petitioner's appeal as moot. The Receiver argued that because the receivership funds had already been distributed, the only effective remedy that could be afforded petitioner was no longer practicable. The CFTC also filed a motion to dismiss petitioner's appeal on the same mootness grounds.

In response, petitioner acknowledged that the receivership monies had been distributed without payment of

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[3] In addition to the orders described in the text, the district court signed an additional order on December 4, 2007, authorizing the Receiver to close the receivership estate. Pet. App. 13a-16a.

her claim. She stated, however, that she was not seeking a remedy that would undo the completed distribution or otherwise "require the Receiver to undertake the recovery of funds [already] disbursed." Pet. C.A. Br. Responding to Receiver's Mot. to Dismiss 5. Rather, petitioner argued that her appeal was not moot because a legal ruling in her favor, holding that the district court had erred in denying her claim, would provide her "with that first necessary step in determining if subsequent legal action is appropriate and feasible against the Receiver and his firm for irresponsibly suggesting the course of action taken by the District Court." *Id.* at 3; see *id.* at 7 ("A decision now from the Appellate Court that concludes no sound legal or equitable basis existed for ordering funds * * * to be released * * * is all the relief Appellant seeks. [Such a decision] would simply allow 'the chips to later fall where they may' in any later legal action that may be brought by [petitioner] against the Receiver and his firm.").[4]

On May 15, 2008, the court of appeals issued an unpublished order granting the motion to dismiss petitioner's appeal on constitutional mootness grounds. Pet. App. 4a-6a. The court explained, that because the receivership funds had already been distributed, the "only effective relief that [the court] could grant would be to direct the District Court to allow [petitioner's] claim, recall the distribution from all other investors, and order a re-distribution that would include payment to [petitioner]." *Id.* at 5a. The court stated, however, that it

[4] Petitioner made similar contentions in her opening appellate brief on the merits. See Pet. C.A. Br. 30 ("It should never be 'moot' for the Appellate Court to correct previous incorrect legal decisions of the district courts simply because the Appellate Court may not be able to provide an appropriate equitable remedy.").

need not determine whether such relief could be appropriate because petitioner had "expressly disclaimed" any request for that remedy. *Ibid.* Instead, petitioner simply sought a "legal ruling that the District Court erred in denying her claim." *Id.* at 5a-6a. The court of appeals held that it lacked authority to issue what would be, in effect, an advisory opinion, *id.* at 6a (citing *Church of Scientology* v. *United States*, 506 U.S. 9, 12 (1992)), and it rejected petitioner's contention that a favorable ruling would be of "practical consequence to her by allowing her to consider bringing a hypothetical and unidentified claim against the Receiver, whose conduct is not at issue in this appeal," *ibid.*

c. On July 8, 2008, the court of appeals denied without substantive analysis petitioner's request for rehearing and rehearing en banc. Pet. App. 7a-8a.

ARGUMENT

The court of appeals correctly held that petitioner's appeal was moot because the only relief she requested was, in effect, an advisory opinion that the court lacked authority to issue. That decision does not conflict with any decision of this Court or any other court of appeals. Further review therefore is not warranted.

1. Contrary to petitioner's contention (Pet. 12-22), the ruling below is fully consistent with this Court's decision in *Church of Scientology* v. *United States*, 506 U.S. 9 (1992). At issue in *Church of Scientology* were copies of two tapes that included recorded conversations between church officials and their attorneys. Over the church's objection, the district court granted the request of the Internal Revenue Service (IRS) for an order compelling production of the tapes. While the church's appeal from the district court's order was pending, copies

of the tapes were delivered to the IRS. Finding that a justiciable controversy no longer existed, the court of appeals dismissed the appeal as moot. *Id.* at 10-12.

This Court reversed. Even though the tapes had already been delivered to the IRS, the Court held that a ruling favorable to the church would still provide "*some* form of meaningful relief in circumstances such as these." *Church of Scientology*, 506 U.S. at 12-13. Specifically, the Court found that if the church were to prevail, "a court does have power to effectuate a partial remedy by ordering the Government to destroy or return any and all copies it may have in its possession. The availability of this possible remedy is sufficient to prevent this case from being moot." *Id.* at 13.

Here, by contrast, the court of appeals correctly concluded that no effectual relief would be available if it ruled in petitioner's favor. As petitioner, the Receiver, the CFTC, and the court of appeals all recognized, the relevant restitution checks have already been disbursed by the Receiver. Pet. App. 5a. While attempting to reclaim those payments from their various recipients would be of dubious practicality, petitioner expressly denied, and continues to deny, that she is seeking any such relief. *Ibid.*; see Pet. 18. Instead, petitioner informed the court of appeals that she merely sought a legal ruling in her favor so that she could use it as a basis for a potential future lawsuit against the Receiver. Pet. App. 5a-6a. Such a ruling, unaccompanied by any tangible remedy, would not constitute "meaningful" or "effectual" relief under this Court's longstanding precedents. Rather, as the court of appeals correctly observed, what petitioner requested was in substance an advisory opinion, relief that the court of appeals lacked

authority to grant. *Id.* at 6a; see, *e.g.*, *Church of Scientology*, 506 U.S. at 12.[5]

2. Petitioner also contends (Pet. 14-22) that her appeal is not moot because a favorable decision on the merits would entitle her to portions of any future restitution payments made by two defendants in the underlying action who have executed consent agreements with the CFTC. Because that argument was not raised until the petition for rehearing and rehearing en banc (Pet. App. 64a-82a), it is not properly before this Court. In any event, the contention is without merit.

a. Petitioner acknowledges that her argument based on possible entitlement to future restitution payments from the two defendants was first made in her petition for rehearing and rehearing en banc. See Pet. 15 ("It is true that a more persuasive argument for appellate jurisdiction was probably made in the petition for en banc review than in Petitioner's response to both Mr. Bobo's and the Respondent's motions to dismiss for mootness."). Courts of appeals are not obligated to address matters that are not timely raised, and they ordinarily decline to consider claims raised for the first time in a petition for rehearing. See, *e.g.*, *Peter* v. *Hess Oil V.I.*

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[5] To the extent petitioner contends (Pet. 15) that the court of appeals' decision is inconsistent with *Donovan* v. *Punxsutawney Area Sch. Bd.*, 336 F.3d 211 (3d Cir. 2003), any such intra-circuit conflict does not warrant this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam). In any event, there is no conflict between the Third Circuit's decisions in *Donovan* and in this case. In both cases, events that took place after a district court's entry of judgment prevented the court of appeals from being able to grant a form of relief requested by the aggrieved party. In *Donovan*, the event was appellant's graduation from high school; in this case, it was the completed distribution of restitution checks by the Receiver. See *Donovan*, 336 F.3d at 216-217; Pet. App. 5a-6a.

Corp., 910 F.2d 1179, 1181 (3d Cir. 1990) (refusing to consider an argument raised for the first time in a petition for rehearing when there was "no legitimate excuse for failing to raise this argument in a timely manner"), cert. denied, 498 U.S. 1067 (1991); *Easley* v. *Reuss*, 532 F.3d 592, 593-594 (7th Cir. 2008) ("Panel rehearing is not a vehicle for presenting new arguments, and, absent extraordinary circumstances, we shall not entertain arguments raised for the first time in a petition for rehearing."); *United States* v. *Levy*, 416 F.3d 1273, 1275-1276 (11th Cir.) (per curiam), cert. denied, 546 U.S. 1011 (2005). Consistent with that usual practice, the court of appeals denied petitioner's rehearing request without substantive comment. See Pet. App. 7a-8a.[6]

It is also well settled that this Court rarely reviews matters that were not properly raised below or passed upon by the court of appeals. See, *e.g.*, *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970); *Taylor* v. *Freeland & Kronz*, 503 U.S. 638, 645-646 (1992); see also *Wills* v. *Texas*, 511 U.S. 1097, 1097-1098 (1994) (O'Connor, J., concurring in denial of certiorari) ("It has been the traditional practice of this Court * * * to decline to review claims raised for the first time on rehearing in the court below. Following this practice here makes good sense because we do not have the benefit of a decision analyzing the application of [the rule] to the facts of petitioner's case.") (internal citation omitted). Because petitioner's argument was not timely raised below and was not passed upon by the court of appeals, it is not properly before this Court and does not warrant review.

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[6] For the reasons discussed in the text, petitioner's claim that the "denial of her petition for rehearing was an unjustified abuse of discretion," Pet. 13, also lacks merit and does not warrant this Court's review.

b. In any event, petitioner's argument lacks merit. In an effort to show a continuing personal interest in the effect of the district court orders from which she appealed, petitioner relies on consent agreements entered into by two defendants in the underlying action that require restitution beyond that already distributed by the Receiver. Petitioner identifies no evidence or other information indicating that arrangements for payment of restitution by those defendants have been established or that the defendants possess assets that would make restitution possible. Indeed, as petitioner acknowledges, "no funds exist at the moment" with respect to those potential restitution payments. Pet. 21.

3. Petitioner's remaining contentions—that the court of appeals was required to exercise jurisdiction (Pet. 23-24) and that petitioner was denied due process (Pet. 25-27)—lack merit and do not warrant this Court's review. For the reasons set forth above, the court of appeals correctly determined that petitioner's appeal was moot. The court therefore correctly declined to exercise jurisdiction, and petitioner was not denied due process of law.

4. Petitioner raises no issue of general significance, but simply contends that the court of appeals misapplied settled legal principles to the unusual facts of this case. The court below was clearly correct in stating that, if an intervening event "makes it impossible for the court to grant 'any effectual relief whatever' to a prevailing party, the appeal must be dismissed." Pet. App. 5a (quoting *Church of Scientology*, 506 U.S. at 12). Petitioner does not dispute that articulation of the governing legal standard, but simply argues that effectual relief was in fact possible here notwithstanding the distribution of the receivership funds. Even if petitioner's argument on

that point were more persuasive, it would raise no legal issue of broad and recurring importance.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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